NO. 47850-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOSE RAFAEL CASTRO-LINO, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01530-5

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Unpublished Cases

RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court properly denied Castro-Lino's motion for a new trial.

II. Castro-Lino was not prejudiced by his attorney's actions at the motion for a new trial.

III. Castro-Lino had the benefit of effective counsel.

STATEMENT OF THE CASE

Castro-Lino was charged by Information with Rape in the Second Degree, alleging he had sexual intercourse with M.L. when she was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 10. The State alleged Castro-Lino, M.L.'s friend's mother's boyfriend, anally raped M.L. while she was asleep on her friend's bed in the home her friend shared with Castro-Lino on January 4, 2014. CP 6.

At trial, M.L. identified the defendant, Jose Castro-Lino (hereafter 'Castro-Lino') as her friend Chris's mother's boyfriend. RP 90. She knew him as "JC." RP 89-90. M.L. had only seen Castro-Lino a couple of times prior to January 4, 2014 while at Chris's house, but did not have much interaction with him on those occasions. RP 91.

M.L. was born on March 23, 1994; she was 21 years old at the time of trial, and 19 years old in January 2014. RP 87. On January 4, 2014,

M.L. worked until 2 a.m. at a hookah lounge, and then went to Chris's house to hang out with him and some friends. RP 93-94. Several people were there including individuals known to her as Chris, Kaitlyn, Ella, Moody, Robert, Bennie, Maribel, and Castro-Lino. RP 94, 98. Everyone except Maribel Garza and Castro-Lino were teenagers. RP 269-70. At the time, Chris and Robert were 18 years old, and Kaitlyn was approximately the same age. RP 267-68. Castro-Lino was the only person present over the age of 21. RP 269. At the time, Castro-Lino was 28 years old. CP 5. While at Chris's house, M.L. consumed a number of beers and a rum and coke, and possibly smoked marijuana. RP 96-97. Everyone at Chris's house was "hanging out, having a good time, and kicking back." RP 97. Everybody had been drinking that night, including Castro-Lino. RP 99. Sometime between 4:30 a.m. and 5 a.m., M.L. went downstairs to go to sleep in Chris's bed. RP 102-03. The others remained upstairs except for Moody, who also went to sleep on Chris's bed next to M.L. RP 102. M.L. does not know anyone by the name of Achmed Mohamud who goes by 'Adam,' and no one by that name was present at Chris's house on January 4, 2014. RP 101. The person M.L. knows as 'Moody' was the only person present at Chris's house of Middle Eastern descent. RP 101. 'Adam' has an accent and is obviously not originally from the United States. RP 273.

M.L. is a heavy sleeper; while asleep in Chris's bed she was laying on her stomach and felt penetration. RP 104. Thinking nothing of it, M.L. rolled over onto her back and felt penetration again. RP 104. She then woke up. RP 104. M.L. described the penetration as either vaginal or anal penetration that "kind of hurt" and that it "didn't really feel like it should be there." RP 105-06. As M.L. woke up, she felt breathing on her face, opened her eyes and saw Castro-Lino on top of her. RP 107. As soon as Castro-Lino realized M.L had opened her eyes he got off of her and went upstairs. RP 107. After Castro-Lino left, M.L. turned to Moody and asked him if he saw what had happened. RP 109. M.L. then asked Moody to take her home. RP 109. As she was gathering her things and leaving Chris's house, M.L. told Robert, Kaitlyn, and Ella what had happened. RP 109. Moody then took M.L. home where she called her friend Hannah. RP 110. Hannah came over immediately and she and M.L. went to PeaceHealth Southwest hospital. RP 110.

M.L. did not consent to the penetration with Castro-Lino and did not want it to happen. RP 116. She had never discussed any sort of sexual activity with Castro-Lino prior to this event. RP 116.

At the hospital, M.L. went through an unpleasant sexual assault examination, spoke with a police officer, received some medication to help with possible exposure to sexually transmitted diseases, and then

went back home. RP 112. The entire process took a couple of hours. RP 112. While at the hospital, registered nurse Stacy Lefebvre examined M.L. RP 139-40. Ms. Lefebvre is a certified sexual assault nurse examiner, and has been for 10 years. RP 131-32. During a sexual assault exam, she takes a patient history, asking the patient what happened, and then does a physical exam. RP 132-33. During the physical exam, Ms. Lefebvre collects evidence and assesses for injuries. RP 133, 135. In her experience, she has found that in 70% to 80% of sexual assaults, no injuries are observed. RP 136. In anal rape cases she does not necessarily expect to find an injury and in her experience has not always observed injuries. RP 136.

In examining M.L., Ms. Lefebvre took chart notes that indicated M.L. described that she was sleeping and "woke up to a sensation of someone having sex with [her]" and so she "rolled over, it started again and when [she] opened her eyes he got off and he ran upstairs." RP 140-41. M.L. told Ms. Lefebvre that the man had used his penis to anally penetrate her. RP 141. Ms. Lefebvre used a sexual assault collection kit to collect M.L.'s underwear, oral swabs, fingernail scrapings, fingertip swabs, pubic hair combing, perineal and vulvar swabs, endocervical vaginal swabs, and anal swabs. RP 145-46. A swab consists of using what is essentially a big Q-tip to collect bodily fluids. RP 146. One swab

involved swabbing the anal area and inside the rectal area to obtain a sample. RP 146-47.

Detective Carole Boswell is a police officer with the major crimes unit of the Vancouver Police Department. RP 167. Detective Boswell was assigned to investigate M.L.'s report of rape. RP 174. Detective Boswell met with M.L. on January 28, 2014 at the police station and interviewed her regarding the events of January 4, 2014. RP 175. Detective Boswell then tried to interview M.L.'s friend Chris, whose full name is Chris Garza. RP 177. Detective Boswell initially spoke to Chris over the phone, but he told her that he was not in a place where he felt free to talk so they set up a different time to speak, but Chris became non-responsive to further attempts at contact. RP 178. Detective Boswell was never able to interview Chris regarding this case. RP 179.

Detective Boswell did interview Chris's mother and Castro-Lino's girlfriend, Maribel Garza. RP 180-81. She asked Ms. Garza to tell Castro-Lino that she wanted to talk to him. RP 181. Castro-Lino then contacted Detective Boswell and met her to discuss the case. RP 185. Detective Boswell's interview with Castro-Lino was recorded and the recording was admitted as exhibit 4 at trial and played for the jury. RP 189. Detective Boswell also collected a DNA sample from Castro-Lino. RP 191. She then sent a request to the crime lab to test the rape kit and the sample from

Castro-Lino; she received the results of that testing on July 24, 2014. RP 197-98.

Detective Boswell also tried to contact Moody to interview him regarding the case, but she was unable to contact him; he did not return her voicemail message that she left at the number she had for him, she could not find him through the college he attended, and he did not return a Facebook message she sent him. RP 199-200.

In her experience investigating sexual assaults, Detective Boswell finds the presence of injuries to victims to be atypical, including in allegations of anal rape. RP 183.

Laura Kelly is a forensic scientist in the DNA section of the Washington State Patrol crime lab. RP 209-10. She performed the DNA testing of the rape kit in this case, focusing on the perineal vulvar swabs, vaginal endocervical swabs, and anal swabs taken from M.L. during her examination at PeaceHealth following the rape. RP 230. The perineal vulvar swabs tested positive for the presence of semen (spermatozoa) in one test, but none were observed by Ms. Kelly's microscopic examination, so she could not confirm a positive result. RP 233-34. The vaginal endocervical swab was negative for the presence of semen. RP 235. The anal swab was positive for the presence of sperm cells. RP 236. Ms. Kelly

was able to obtain a DNA profile from the sperm cell component of the anal swab. RP 238.

Ms. Kelly was also able to obtain a DNA profile from the known sample that Detective Boswell took from Castro-Lino. RP 240. She then compared the known DNA profile from Castro-Lino with the DNA profile from the sperm cells on the anal swab taken from M.L. during the rape examination, and found the two profiles matched. RP 240-41. Ms. Kelly then obtained a statistic which estimates the probability of selecting a random unrelated individual from the U.S. population with a matching profile. RP 242. The probability of selecting an unrelated individual at random from the U.S. population with a matching profile was 1 in 800 quintillion. RP 242.

Castro-Lino presented several witnesses in his defense. His fiancée, Maribel Garza testified that on January 4, 2014 Castro-Lino consumed more than 12 Corona beers. RP 252-53. Later that evening Castro-Lino and Ms. Garza's son, Chris, went to a hookah lounge; Ms. Garza stayed home. RP 254. At the time he left, Castro-Lino was "really drunk." RP 254. Chris and Castro-Lino returned to the house later that night, along with Robert, M.L., Kaitlyn, Moody, and another female Ms. Garza did not know. RP 255. Ms. Garza testified that someone named

"Ahmed Mohamud,"[1] known as 'Adam,' also came over, but arrived separately from the group. RP 255-56. All of the persons present at the house were drinking and sitting around the kitchen table. RP 256-59. Ms. Garza spent most of the night in her own room; Castro-Lino joined her at about 6 a.m. RP 260. Around 8 a.m. Chris came into Ms. Garza's room and said that M.L. said someone touched her. RP 261. That day, and any time they discussed the situation, Castro-Lino told Ms. Garza that he did not remember what happened. RP 280. Castro-Lino never told Ms. Garza that he had consensual sex with M.L. RP 280.

Chris Garza also testified for Castro-Lino at trial. RP 300. On January 4, 2014, Chris went with Robert and Castro-Lino to a hookah bar. RP 301. Castro-Lino had been drinking alcohol prior to going to the hookah bar. RP 302. After they left the hookah bar, a group of people went to Chris's house. RP 305. Robert, M.L., Moody, Kaitlyn, another female, Ms. Garza, and Castro-Lino were at Chris's home that night. RP 306. Chris did not remember if 'Adam' was present that night. RP 306-07. Chris was intoxicated that night; he went to sleep in his brother's bed and woke up to Robert telling him what had happened and Chris then rushed in to his mother's room to ask her what was going on. RP 309-10.

---

[1] The person referred to by witnesses as 'Adam' and 'Ahmed Mohamud' is also named in the record as 'Hamed Mohamud.' Despite the different spellings of the name, it is clear from the record the parties are referring to the defense witness, Hamed Mohamud.

Robert Dalton testified for Castro-Lino at trial. RP 326. He was with Chris and Castro-Lino the evening of January 4, 2014 and observed that Castro-Lino was intoxicated. RP 332. After hanging out at Chris's house with a bunch of people, Robert went to his house to sleep. RP 333. He received a phone call around 7a.m. from M.L. asking him to pick her up from Chris's house. RP 333-34.

Hamed Mohamud, who goes by 'Adam' for short, testified that he arrived at Chris's house around 2:30 a.m. to 3 a.m. on January 4, 2014. RP 348. Castro-Lino appeared to be intoxicated. RP 351. Adam testified that M.L. was flirting with Castro-Lino and that this bothered him. RP 352-53. Adam went to sleep on the couch in the living room, and woke up in the morning to go to work. RP 354-55. He testified he went downstairs and saw Castro-Lino on the bed downstairs on top of M.L., while M.L. was on her back, and they were holding each other. RP 355. Seeing this upset Adam and he felt it was wrong. RP 376. Adam works with Ms. Garza's other son, Benny, but testified he did not know Castro-Lino had been charged with a crime until a few months prior to trial, and then contacted Castro-Lino's attorney and not the police. RP 360, 383-84.

After Castro-Lino's final witness, the trial court took a break for approximately 19 minutes. RP 390. After the break, Castro-Lino rested his case without testifying, and the State did not call any rebuttal witnesses.

390-91, 394. After submitting the case to the jury, the jury returned a verdict of guilty on the charge of Rape in the Second Degree. CP 186; RP 455.

After the trial, Castro-Lino obtained new counsel and filed a motion for a new trial under CrR 7.5(a) alleging ineffective assistance of counsel. CP 231. The trial court received testimony and heard argument on this motion on May 29, 2015. At the hearing, Castro-Lino's trial attorney, Sean Downs, and Castro-Lino testified. 5.29.15 RP 1-70.

Mr. Downs testified that he is an attorney in Vancouver, Washington whose practice focuses primarily on criminal defense. 5.29.15 RP 31-32. He represented Castro-Lino on rape charges in this case. *Id.* Castro-Lino had wanted to testify and tell his side of the story if the case went to trial. *Id.* at 38. However, at trial, Castro-Lino asked Mr. Downs if he should testify. *Id.* at 51. So during a break in the proceedings, Mr. Downs and Castro-Lino discussed the issue of Castro-Lino testifying, and Mr. Downs advised against it. *Id.* at 38. He explained his reasons to Castro-Lino, and they discussed the pros and cons of having him testify. *Id.* at 38-39. Mr. Downs explained that he felt their defense witness testified "terrifically" and was a "really credible witness," and he believed that testimony would exonerate Castro-Lino. *Id.* at 39. Mr. Downs believed it was risky to have Castro-Lino testify to something contrary to

what he told law enforcement. *Id.* Castro-Lino had essentially told law enforcement he was too intoxicated to remember what happened, and Mr. Downs felt their lay witnesses corroborated that version of the events. *Id.* at 40. Mr. Downs felt the decision of having Castro-Lino testify or not involved "a matter of balancing what you think a jury is going to believe (inaudible). Is the jury going to believe Mr. Castro-Lino a year after the fact remembering? Are they going to believe Adam? Or which one is a little more credible to them?" *Id.* at 41. Mr. Downs felt the issue of having Castro-Lino testify to something different than he told law enforcement was a significant issue. *Id.* at 50. Mr. Downs was concerned the jury may not find any explanation for the "completely inconsistent statement" to be credible. *Id.* Mr. Downs believed if the jury found Castro-Lino was lying then they would assuredly lose the trial. *Id.* Mr. Downs discussed his concerns with Castro-Lino during the break at the trial, and advised him that it was not in his best interests to testify. *Id.* at 51. Castro-Lino agreed with Mr. Downs. *Id.* If Castro-Lino had said he wanted to testify despite Mr. Downs's advice, Mr. Downs would have honored that decision. *Id.* at 51-52.

At the hearing on his motion for a new trial, Castro-Lino testified, and he agreed that during the trial he asked Mr. Downs, "do you want me to testify?" 5.29.15 RP at 56. Castro-Lino testified that Mr. Downs told

him he did not feel it was a good idea. *Id.* Castro-Lino and Mr. Downs had a good working relationship. *Id.* at 57. Regarding how Castro-Lino felt about Mr. Downs's advice on whether to testify, the following exchange took place during his testimony:

> PROSECUTOR: Did you agree with his assessment that you should not testify?
>
> CASTRO-LINO: Um, I would agree, but still – I mean, I would agree because he's a lawyer. So by him telling me not to because he's afraid that it might open doors to something else – I mean, to me, I told him I was – that's why I wrote it, like, in – like, every – in the three-days' period of time that I was in trial I told him I wanted to testify: "do you want me to testify?"
>
> PROSECUTOR: You asked him if he wanted you to testify.
>
> CASTRO-LINO: And I told him I wanted to testify.
>
> PROSECUTOR: He said, "no."
>
> CASTRO-LINO: Yes.
>
> PROSECUTOR: And you ultimately decided, using his advice, not to testify.
>
> CASTRO-LINO: I used his advice. He said, "We're winning."
>
> PROSECUTOR: So you took his advice into account and decided not to testify; is that accurate?
>
> CASTRO-LINO: Because he said we were winning.
>
> PROSECUTOR: So you made that decision based on his advice?

CASTRO-LINO: Based on his advice.

Id. at 57-58. Afterwards, Castro-Lino felt like he received bad advice. *Id.* at 58. He accepted his lawyer's advice and "went with what he was saying." *Id.*

In his motion for a new trial, Castro-Lino argued pursuant to CrR 7.5 that he should receive a new trial because his attorney prevented him from testifying. CP 231-35; 5.29.15 RP at 61. The trial court denied the motion for a new trial. 5.29.15 RP at 68-70. The trial court stated in making its decision on this issue:

> It would be untenable if a person on the day of their arraignment said, 'you know, I want to testify in this thing,' and the defense counsel says, 'Well, I guess I can't say anything to – more to you about whether I think that's a good idea or a bad idea,' which is essentially what you're suggesting. That once the defendant says, 'I want to testify,' the defense counsel can't give him any advice about that because if he gives him advice and ultimately convinces him not to testify, he'd be in exactly the situation that he is here.
>
> You seem to be suggesting that if you went to trial with Mr. Castro-Lino and he told you several times, 'I want to testify,' and you told him, 'You know, in my professional opinion, that's a really stupid idea,' and he said, 'well, you're the professional; I'm going to accept your advice,' that you would be ineffective by giving him that advice. That's simply not the law in this state.
>
> Mr. Castro-Lino was given advice about whether he should or shouldn't testify. He decided he didn't want to testify,

> based on his lawyer's advice. There's absolutely nothing improper about that.
>
> Given the circumstances, I don't find it's a case where absolutely a person has to testify here. I, again, don't know exactly what Mr. Castro-Lino would say, but he certainly was in a position where he may have done himself more harm than good. He'd already indicated he couldn't remember things. And if he gets up on the stand and says, 'Oh, now I suddenly remember something that I did then,' Dr. Reisberg's testimony notwithstanding, may have done himself more harm than good to the jury. But even if that's what he wanted to do, he accepted his attorney's advice and didn't testify. So he wasn't actively prevented from testifying, and Mr. Downs was not ineffective in that regard.

5.29.15 RP at 68-70.

Castro-Lino was sentenced pursuant to RCW 9.94A.507 to a minimum term of 90 months, a term within the standard sentencing range, and a maximum term of life in prison. CP 271; 286.

ARGUMENT

I. The trial court properly denied Castro-Lino's motion for a new trial.

Castro-Lino argues the trial court erred in denying his motion for a new trial based upon his claim that his attorney was ineffective by preventing him from testifying at trial. However, Castro-Lino's claim his attorney improperly prevented him from testifying fails and therefore the trial court did not err in denying his motion for a new trial.

CrR 7.5(a) provides that a defendant may move the trial court for a new trial if it affirmatively appears his substantial right to a fair trial was materially affected. CrR 7.5(a). A trial court's decision on a motion for a new trial is reviewed for a manifest abuse of discretion. *State v. Jackman*, 113 wn.2d 772, 777, 783 P.2d 580 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon unreasonable or untenable grounds, or is based upon a mistake of law. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (citing *In re Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). In a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). An attorney's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A defendant shows prejudice if he shows that the outcome would have been different if not for his attorney's deficient performance. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

An analysis on a claim of ineffective assistance of counsel begins with the strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's legitimate trial strategy or tactic cannot serve as the basis for a defendant's claim of ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The question of whether a defense attorney's conduct was reasonable must be determined by considering all the circumstances on the facts of the particular case at the time of the attorney's alleged deficient conduct. *Strickland*, 466 U.S. at 690-90.

A criminal defendant has the right to testify on his own behalf under both the federal constitution and the Washington State constitution. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). Under the federal constitution, a defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. *Id.* at 758 (citing *Rock*, 483 U.S. at 51-52). In Washington, article I, section 22 of the constitution explicitly protects a defendant's right to testify. *Id.* (citing *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). This right to testify is fundamental, and neither a court nor defense counsel may revoke this right. *Id.* (citing *Thomas*, 128 Wn.2d at 558).

The ultimate decision of whether to testify rests with the defendant. *Id.* at 758-59 (citing *Thomas*, 128 Wn.2d at 558-59). An

attorney who uses threats or coercion to prevent his client from testifying violates that client's fundamental right to testify. *Id.* at 763 (citing *U.S. v. Robles*, 814 F.Supp. 1233, 1242 (E.D.Pa. 1993) and *U.S. v. Butts*, 630 F.Supp. 1145, 1147 (D.Me. 1986)). However, there is a significant difference between cases in which an attorney actually prevents his client from taking the stand, and cases in which the attorney "merely advises the defendant against testifying as a matter of trial tactics" and that defendant chooses to follow his attorney's advice. *Id.* at 763 (quoting *State v. King*, 24 Wn.App. 495, 499, 601 P.2d 982 (1979)). A defendant who remains silent at trial and later claims his attorney actually prevented him from testifying must allege specific, credible facts that show his attorney coerced him into waiving his right to testify. *See id.* at 760. A defendant who accepts and relies upon the tactical advice from his attorney cannot later claim his right to testify was denied. *State v. Hardy*, 37 Wn.App. 463, 681 P.2d 852 (1984).

In *State v. Hardy*, *supra,* the Court of Appeals found a defendant was not actually prevented from testifying when he accepted his attorney's advice not to testify. There, the defense attorney explained to the defendant that testifying would have a "disastrous effect" and that the attorney was "developing a certain theory of the case through cross-examination of the State's witnesses." *Hardy*, 37 Wn.App. at 467. The

defendant fell silent when his attorney explained this to him. *Id.* From that factual circumstance, the Court of Appeals in the *Hardy* case found the defendant was "in no sense actually prevent[ed]" from testifying. *Id.*

The trial court in the case at bar had even more evidence showing that Castro-Lino made the decision, himself, based upon his attorney's advice, not to testify than the Court did in *Hardy, supra.* While testifying at the hearing on his motion for a new trial, Castro-Lino admitted that he accepted his attorney's advice not to testify, and that he agreed with his attorney's assessment of the situation because he was a lawyer. 5.29.15 RP at 57-58. In *Hardy*, the court had no evidence from the defendant agreeing he had accepted his attorney's advice, and only had testimony from the attorney that the defendant "fell silent." *Hardy*, 37 Wn.App. at 467. In Castro-Lino's case, the uncontroverted evidence is that Mr. Downs believed it was not sound trial strategy to present Castro-Lino as a witness, that he communicated this to Castro-Lino, and that Castro-Lino accepted this advice and did not testify. The trial court soundly and properly found that Castro-Lino "was given advice about whether he should or shouldn't testify" and that he "decided he didn't want to testify, based on his lawyer's advice," and that he "wasn't actively prevented from testifying." 5.29.15 RP at 69-70.

The trial court's oral decision on this issue shows the court considered the proper legal standard, considering whether Castro-Lino was actually prevented from testifying and whether his attorney was ineffective in that regard. 5.29.15 RP at 69-70. This decision was sound, based upon a proper understanding of the law, and supported by substantial evidence in the record. The uncontroverted evidence showed Castro-Lino discussed the benefits and drawbacks of testifying with his attorney, and accepted his attorney's advice on the subject, choosing not to testify. Castro-Lino did not testify due to his decision to accept his attorney's advice, and there was no evidence to suggest he was misled or coerced into waiving his right to testify. The trial court properly found this allegation did not warrant a new trial pursuant to CrR 7.5. Castro-Lino's motion for a new trial was properly denied.

II. Castro-Lino was not prejudiced by his attorney's actions at his motion for a new trial.

Castro-Lino argues he was denied effective assistance of counsel because his attorney at his motion for a new trial hearing did not elicit testimony from him regarding how he would have testified at trial. The substance of Castro-Lino's testimony had no relevance to whether his substantial rights were affected. Castro-Lino cannot show he was

prejudiced by his attorney's actions and his claim of ineffective assistance of counsel fails.

A defendant claiming ineffective assistance of counsel must show that his attorney's performance was objectively deficient and resulted in prejudice. *McFarland,* 127 Wn.2d at 334–35. The attorney's representation is presumed to have been effective. *Id.* at 335. To establish his attorney's performance was deficient, a defendant must show "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id.* at 336. To show prejudice, a defendant must show that the outcome would have been different if not for his attorney's deficient performance. *Pirtle*, 136 Wn.2d at 487. The failure to show either deficient performance or prejudice defeats a defendant's claim. *McFarland,* 127 Wn.2d at 334–35, 899 P.2d 1251.

In his motion for a new trial based on the claim that he was prevented from testifying, Castro-Lino needed to have shown both that he was actually prevented from testifying by his attorney, and that he was prejudiced by that conduct. As discussed above, Castro-Lino failed to show he was "actually prevented" from testifying. By his own admission he accepted his lawyer's advice and opinion on the subject, thus choosing not to testify. Whether he was then prejudiced by his own decision not to testify is moot. A claim of ineffective assistance of counsel is defeated if a

defendant fails to show deficient performance. *McFarland*, 127 Wn.2d at 334-35. As it is clear that Castro-Lino did not, and could not, meet the first hurdle of showing deficient performance of trial counsel, the fact that his counsel for his CrR 7.5 motion failed to establish the substance of his proposed testimony is inconsequential.

Furthermore, even if his motion counsel had elicited testimony from Castro-Lino about the anticipated content of his testimony had he taken the stand in his own defense, it would not have affected the trial court's decision. The trial judge made this explicit in its decision. In discussing the fact that the trial court had no knowledge of what the substance of Castro-Lino's proposed trial testimony would have been, the judge stated, "...I have no way of knowing whether it prejudiced him or didn't prejudiced him to bring that to the case. *And it's irrelevant in any case.*" 5.29.15 RP at 68 (emphasis added). The judge continued, finding that Castro-Lino was in no way prevented from testifying by his attorney's advice, that there was nothing improper about the attorney's performance, and that the attorney was not ineffective. *Id.* at 68-70. Castro-Lino cannot show that had his attorney established what his testimony at trial would have been that the outcome of the motion hearing would have been different. This is Castro-Lino's burden in making this claim. The record is explicitly clear: the prejudice prong of his ineffective assistance of counsel

claim is "irrelevant." *Id.* at 68. Castro-Lino's claim of ineffective assistance of counsel fails.

III. Trial counsel was not ineffective for failing to object to the prosecutor's arguments.

Castro-Lino argues his trial attorney was ineffective for failing to object to multiple allegedly improper arguments the prosecutor made during his closing arguments. Castro-Lino alleges his attorney's failure to object to the prosecutor's "inflammatory comments and expressions of personal belief," his expression of his personal opinion on the victim's credibility, his arguments that shifted the burden of proof, and his misstatements of the law improperly prejudiced Castro-Lino resulting in an unfair trial. The prosecutor's statements during his closing arguments were not improper, and Castro-Lino's attorney was not ineffective for failing to object. Castro-Lino's claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions

based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

"Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions." *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to

object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004)). Additionally, in a claim of ineffective assistance of counsel based on failure to object to prosecutorial misconduct, when the prosecutor's arguments are not improper, defense counsel is not deficient for failing to object. *See State v. Larios-Lopez,* 156 Wn.App. 257, 262, 233 P.3d 899 (2010) (stating "[b]ecause we have already determined that the prosecutor's arguments were not improper, Larios-Lopez does not show that his counsel's performance was deficient in failing to object to them."). Further, in order to show his attorney was ineffective, Castro-Lino must show that his objections to the prosecutor's arguments would have been sustained. *See State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007) (citing to *Davis*, 152 Wn.2d at 748).

In this case, the standard for considering prosecutorial misconduct claims is also relevant to this Court's determination of Castro-Lino's ineffective assistance of counsel claim. The determination of whether counsel's decision not to object was reasonable turns on whether the prosecutor's arguments were indeed improper, and whether Castro-Lino could show that a timely objection from his attorney would have either changed the outcome of the trial, or affected this Court's decision on a

prosecutorial misconduct claim under the lower standard of review afforded to preserved claims of misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*,

165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct

caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Castro-Lino cannot show either that his attorney was deficient in failing to object to the prosecutor's arguments, or that the prosecutor's statements constituted misconduct which denied him a fair trial. This Court should reject Castro-Lino's claims of ineffective assistance of counsel.

Castro-Lino argues the prosecutor used prejudicial and inflammatory language in his closing argument by referring to Castro-Lino as a "predator." Specifically, the prosecutor stated, "[t]he evidence in this case shows that the Defendant is a predator who abused and violated [the victim] when she was intoxicated, when she was asleep, and that he violated her in the worst way that we could think of." RP 413. The prosecutor's statement was a permissible conclusion from the evidence and supported the State's theory of the case, that Castro-Lino hung out with teenagers, persons ten years his junior and contemporaries of his soon-to-be stepson, offering them alcohol, and taking advantage of the victim while she was passed out and completely vulnerable, unable to

protect herself from his attack. Cases that warrant reversal involve instances of misconduct in which the prosecutor's statements are clearly inflammatory and prejudicial. *See, e.g., State v. Belgrade*, 110 Wn.2d 504, 506-08, 755 P.2d 174 (1988) (referring to the defendant as part of a "deadly group of madmen" that were "butchers, that killed indiscriminately"), *aff'd*, 119 Wn.2d 711 (1992). Viewing the record as a whole, including all the evidence and the closing argument, this statement by the prosecutor was not improper, did not inflame the passions of the jury, and did not cause enduring prejudice to Castro-Lino's right to a fair trial.

Even if the prosecutor's reference to Castro-Lino as a "predator" was improper, Castro-Lino has failed to show any prejudice, either from the prosecutor's use of the word, or from his attorney's failure to object to this argument. In considering the context of the entire trial, the prosecutor's entire closing argument, and the evidence in the case, as the legal standard directs, it is clear the singular, fleeting use of an improper term does not undermine this Court's confidence in the outcome of the trial. In determining whether misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict, the question is always, "'has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'"

Emery, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932) (alteration in original)). The prosecutor's remarks were not so flagrant as to have engendered a feeling of prejudice in the minds of the jurors.

Further, in determining whether misconduct prejudiced the defendant, Courts should consider the strength of the evidence against the defendant, along with other trial regularities in determining if the misconduct resulted in prejudice. *Anderson*, 153 Wn.App. at 432, n. 8. The prosecutor's arguments contained no other improper remarks, there was no instructional error, and the trial as a whole contained no other misconduct or irregularities. The evidence in this case was overwhelming: M.L. immediately reported the rape and submitted to a sexual assault examination, during which the nurse examiner collected semen from inside M.L.'s rectum. Castro-Lino's DNA was matched by a probability of 1 in 800 quintillian to the semen found in M.L.'s rectum. Castro-Lino told police no intercourse occurred, and never claimed consensual sexual intercourse or contact in his interview with police, or in any of his subsequent conversations about the matter with his fiancée. The issue for the jury was not whether sexual intercourse occurred, but rather it was whether M.L. was incapable of consent due to mental incapacitation or physical helplessness at the time of the sexual intercourse. The jury found

M.L. was physically helpless or mentally incapacitated, thus rejecting 'Adam's' claim that he saw M.L. engaging in consensual intercourse with Castro-Lino. The prosecutor's use of the term "predator" in referring once to Castro-Lino had no bearing on its determination of M.L.'s capacity to consent at the time of the intercourse. This comment did not prejudice Castro-Lino or improperly sway the jury to convict when it otherwise would have acquitted. Any potential misconduct from the prosecutor's use of this term was not prejudicial to Castro-Lino and he has not shown that it was.

Castro-Lino also argues that the prosecutor used prejudicial and inflammatory language in his closing argument by calling attention to the sexual assault examination that the jury heard evidence of during the trial. It is preposterous to conclude the prosecutor's discussion of the evidence admitted at trial, specifically the sexual assault examination evidence and the DNA evidence found from a swab from inside the victim's rectum, was prejudicial and inflammatory simply because of the use of the word "rectum," "anus," or because the nature of the evidence offends some people's sensibilities. The fact of the matter was that this victim was anally raped. The medical examination of the victim after the rape included examination of her genitalia and her anal/rectal area. The nurse examiner took swabs from inside the victim's rectum. These are facts that

were testified to at trial. RP 145-47. A prosecutor may certainly reference evidence admitted at trial during his closing argument. Castro-Lino's claim that such comments were "unbefitting the office of the prosecutor" is wholly without merit. Appropriate reference to the evidence the jury heard and should consider in making its decision was far from improper and in no way evinces this particular prosecutor's lack of morality or "fitness" for the position he holds. Use of scientific, medically appropriate words, words used during a witness's testimony to describe the actions of the sexual assault nurse examiner, do not render the prosecutor's argument improper or prejudicial. The prosecutor did not use derogatory language or slang in discussing this evidence, nor did he overly or inappropriately discuss lurid details of the sexual assault examination. In fact, the prosecutor stated:

> ...But obviously there's more evidence in this case because, as we know, [victim], she goes to Southwest, she has the sexual assault examination that we heard from Nurse Kelly about, and we heard that that, you know, it doesn't sound like a very pleasant process, obviously it's invasive, the body's being examined, samples are being taken, and she went to the hospital, she submitted to that right after the incident, just within a few hours after she was able to go home, collect herself, go there with a friend, some support.

RP 419. The prosecutor further discussed:

> ...You heard the testimony from the forensic scientist and you heard that the Defendant's semen, his sperm was

> recovered from inside [victim's] body, from – there's no way to put this politely – from inside her anus inside her rectum from the swab that the nurse collected. And you heard, you know, I think it was 1 in 800 quintillion, maybe it was 700 quintillion, it doesn't really matter one way or the other, it's an extraordinary probability matching his DNA to what was recovered from inside her body, corroborating her account of being penetrated while she sleeps, of being violated by the Defendant."

RP 421. The prosecutor never used the words anus or rectum again in his closing statements. Appropriately referencing trial testimony and using medically appropriate terms is not improper, nor was it intended to "inflame the jury's passion," or "designed to deprive the Defendant of a fair trial." Failing to object to appropriate closing statements does not amount to deficient performance of trial counsel. Had Castro-Lino's attorney objected to these arguments, the trial court would have overruled his objection as a personal distaste for discussion of anal rape is not a basis to object to a prosecutor discussing the evidence admitted at a trial where the defendant is alleged to have anally raped the victim.

Castro-Lino also argues that his attorney was ineffective for failing to object to the prosecutor stating "if you believe [the victim], as you should given the evidence..." during his closing argument. He argues this conveyed his personal belief of the victim's credibility to the jury. Castro-Lino's claim fails. The prosecutor's argument was proper. A prosecutor "has wide latitude to argue reasonable inferences from the evidence,

including evidence respecting the credibility of witnesses" during closing argument. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) and *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). Instead of focusing on snippets of argument taken out of context, this Court looks to the entire argument to determine whether the prosecutor's argument was improper or vouched for a witness's credibility. *State v. Jackson*, 150 Wn.App. 877, 884, 209 P.3d 553 (2009). In *Jackson*, the prosecutor argued a police officer's "testimony was accurate and true" during his closing argument. *Id.* This Court found the prosecutor did not vouch for the officer's credibility, but rather argued that the "evidence (and reasonable inferences from the evidence) could support the jury's conclusion that the officers were credible...." *Id.* at 884-85. The argument in *Jackson*, which this Court found to be proper, is similar to the prosecutor's statement in the case at bar. In Castro-Lino's trial, the prosecutor argued:

> So in this case if all the evidence that the State had was simply [the victim's] testimony, and if you believed her testimony, as you should, given the evidence, that alone, her testimony alone would be enough evidence for you to find him guilty.

RP 418. The prosecutor further discussed credibility, telling the jury:

> ...You will have to look at the credibility of all the witnesses. You have to look at whether they have any bias, whether their story, whether their testimony makes sense, whether it's reasonable in the context of all the evidence....

RP 444. The prosecutor discussed the evidence presented at trial, discussed why certain witnesses were not credible, and why the evidence presented by the State was persuasive. As in *Jackson, supra*, the prosecutor did not vouch for the victim's credibility, nor did he express a personal opinion on her credibility. *See Jackson*, 150 Wn.App. at 885 (citing to *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). An objection at trial would not have been sustained, nor would the fact of objecting or an instruction to disregard have changed the outcome of the trial. And in the appellate context, Castro-Lino could not show prosecutorial misconduct that prejudiced him even under the lower standard of review had the claimed error been preserved.

Castro-Lino also argues his trial attorney was ineffective for failing to object to prosecutorial misconduct involving burden shifting. Castro-Lino claims the prosecutor argued to the jury that the defendant bore the responsibility of establishing why the victim would falsely accuse him of rape. No such argument occurred, and the prosecutor did not shift the burden of proof to Castro-Lino. His attorney was not ineffective for failing to object to the prosecutor's closing argument.

During Castro-Lino's closing argument he argued the victim lied about being raped, arguing her lack of credibility due to the claim she could not have been anally raped and just roll over without opening her eyes, RP 431, and further stated:

> [the victim] repeating a lie over and over doesn't make it any more true. Stating that lie to Moody doesn't make it true. Stating that lie to Robert doesn't make it true. Stating that lie to Kaitlyn doesn't make it true. Stating that lie to Ella doesn't make it true. Stating that lie to Chris doesn't make it true. Stating that lie to Hanna, [the victim's] mom, Olivia, John, Dean, Zach, Kevin, Hunter, Frances, and Brandon, and Jay doesn't make it any more true. Stating that lie to 16 people that you don't know doesn't make it true.

RP 432-33. Castro-Lino then suggested this was the victim engaging in "attention-seeking behavior," or "regret[ting] hooking up with a practically married man." RP 433. In response, the prosecutor discussed whether the testimony of defense witness 'Adam' was plausible and credible, and argued that the claim the victim was conscious and consented to the act was not particularly credible. RP 444-47. The prosecutor then stated:

> Now, what – so that's the part of the defense. The other part is she, she made it up. And they say, "Well, we don't have to give you a reason, we don't have any reasons," but if you want to say that somebody's lying, if you want to plausibly argue that, you better have a reason. You better have something that makes sense. They say that, "Well, maybe she's just seeking attention." (unintelligible) ask yourselves if the attention that she received was any fun.

> When did the fun being [*sic*] for [the victim]? Was it when she was fleeing the house in tears? Was it when she was at the hospital being examined internally and having evidence collected? Was it when she had to come in and talk to the defense? Was it when she came into court and testified for all of us? Did she seem like she was having fun on the stand? What does she gain from falsely accusing the defendant? Nothing. Why would she do it. There's no reason. It's just thrown out there, "she's lying," but there's no evidence to support that. You ultimately will decide that issue, but what basis do you have to disbelieve her? Why would she make this up? And they make a big deal about, "Well she told people that she was raped." So? How does that undermine her testimony? Wouldn't it be more odd if she had told no one? And if she hadn't told anyone they'd be arguing that, so it's kind of a – she's not going to win for the defense. And we hear again that, "Well, she should've been injured." Well, that's just not the case....

RP 447-48. In the context of the surrounding statements and arguments, the prosecutor's statements were not improper. It would be improper for a prosecutor to argue that the burden of proof rests with the defendant. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). A defendant has no duty to present evidence and thus it is generally improper for a prosecutor to comment on the defendant's failure to present evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Cleveland*, 58 Wn.App. 634, 647, 794 P.2d 546 (1990). It would also be improper for a prosecutor to argue to the jury that in order to acquit the defendant they must find that the victim is lying. *See State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74, *rev. denied*, 118 Wn.2d

1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn.App. 811, 826, 888 P.2d 1214, *rev. denied*, 127 Wn.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wn.App. 869, 874-75, 809 P.2d 209, *rev. denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991).

Here, the prosecutor did not argue the jury must find the victim was lying in order to acquit, or that Castro-Lino had to offer evidence to prove why she was lying in order to acquit. Rather, the prosecutor responded to defense counsel's arguments and argued based on the evidence and common sense that the jury should find the victim credible. In *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), the Court addressed a claim of prosecutorial misconduct for alleged burden shifting in closing argument. There, the Court held that a prosecutor can make a fair response to defense counsel's arguments during rebuttal. *Russell*, 125 Wn.2d at 87. The Court stated that a prosecutor generally is permitted to make arguments that were "invited or provoked by defense counsel and are in reply to his or her acts and statements." *Id.* at 86. Further, "[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn.App. at 885.

In *Jackson, supra*, the Court found the State did not improperly shift the burden to the defense by commenting on the lack of evidence to

support or corroborate a particular claim when the prosecutor mentioned no evidence corroborated a defense witness's testimony and argued the State's witnesses contradicted that witness's version of events. *Jackson*, 150 Wn.App. at 887. The *Jackson* Court also found no prejudice could be established as the jury instructions explained clearly that "the State 'has the burden of proving each element of the crime beyond a reasonable doubt' and the defendant 'has no burden to prove a reasonable doubt exists.'" *Id.* at 888 (citing to the record below). The same instruction was given in Castro-Lino's case. CP 175. As in *Jackson*, the prosecutor in Castro-Lino's case did not improperly shift the burden of proof, and no prejudice can be shown. Castro-Lino's claim his attorney was ineffective for failing to object to this argument fails.

Castro-Lino further argues his trial attorney was ineffective for failing to object to the prosecutor's arguments which misstated the law and reduced the State's burden of proof. Specifically, Castro-Lino claims the prosecutor committed misconduct by improperly arguing the meaning of an "abiding belief." The prosecutor properly argued the standard of proof, and Castro-Lino cannot show he was prejudiced by his attorney's failure to object to this argument.

Castro-Lino claims the following portion of the prosecutor's closing argument improperly reduced the State's burden:

> ...So you apply the facts to that law. And ultimately the question, the final question it comes down to is has the case been proved to you? Are you convinced as the law requires? Are you convinced beyond a reasonable doubt? Because that's what that law requires. The law doesn't require proof beyond all doubt, proof that there's no doubt; the law simply requires proof beyond a reasonable doubt. And fortunately we don't have to guess at what that means because Judge Lewis defines it for us in our instructions, number 3, and we learn that a reasonable doubt is a doubt for which a reason can be given. And if after looking at all the evidence fully and carefully you have a belief, a belief that the defendant did these things, a belief that he's guilty, a belief that abides throughout your deliberations, then at that point you are convinced as the law requires, and at that point it becomes your duty under the to [*sic*] find the Defendant guilty. Which I would ask you to do based on the evidence.

RP 424-25. Castro-Lino claims the prosecutor's argument told the jury that if they "thought [he] was guilty when they started their deliberations" and still thought it after four hours, then they had a duty to convict. This claim twists the prosecutor's argument and contorts it beyond recognition. The prosecutor first told the jury if "after looking at all the evidence fully and carefully...." thus asking the jury not to rely on their preconceived notions or "thoughts" in making this decision as Castro-Lino claims, but rather on what the evidence proved. The prosecutor then told the jury if they had a belief that abides throughout their deliberations then they are convinced beyond a reasonable doubt. RP 424. Castro-Lino argues this was an improper argument because it allowed the jury to believe they only

had to think he was guilty for the four hours of deliberations, and that this belief did not have to be "steadfast, continuing" or "somewhat permanent." The prosecutor's argument in no way inferred the jury's belief did not have to be a strong or nearly certain belief in the defendant's guilt.

"'[A]n abiding belief in the truth of the charge' connotes both duration and the strength and certainty of a conviction." *State v. Osman*, 192 Wn.App. 355, 375, 366 P.3d 956 (2016). A prosecutor acts improperly by "trivializ[ing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing the State's case against the defendant." *State v. Johnson*, 158 Wn.App. 677, 684, 243 P.3d 936 (2010) (quoting *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009)). A prosecutor must not "mischaracterize[] the standard [of proof] as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilty beyond a reasonable doubt. *State v. Feely*, 192 Wn.App. 751, 762, 368 P.3d 514 (2016) (citing to *Pirtle*, 127 Wn.2d at 657-58 and *Osman,* 192 Wn.App. at 368-69). This Court would review a prosecutor's claimed improper remarks "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Brown*,

132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)).

In instructing the jury on the reasonable doubt standard, the trial court stated, "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 175. The court's instructions properly informed the jury of the State's burden of proof. Juries are presumed to follow the court's instructions. *State v. Dye,* 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Castro-Lino appears to argue that the prosecutor's argument informed the jury that it only had to believe in Castro-Lino's guilt until it rendered its verdict. However the prosecutor in no way stated or implied that the jury's belief should not endure past the rendering of its verdict. By stating that if the jury had a belief that abided throughout its deliberations it was convinced beyond a reasonable doubt, the prosecutor was arguing the jury's belief that was steadfast throughout consideration of the evidence, discussion and deliberation of potential doubts, and after looking at all the evidence "fully and carefully" then it was convinced beyond a reasonable doubt. This argument by the

prosecutor in no way improperly stated the law or trivialized the State's burden. Castro-Lino cannot demonstrate the prosecutor's statements here were improper, nor can he show resulting prejudice.

In the unpublished opinion of *State v. Pickering*, 175 Wn.App. 1044, 2013 WL 3777183 (July 16, 2013)[2] this Court considered a prosecutor's discussion of abiding belief in his closing argument as one that "survives this whole process." The Court on appeal found this statement was not a misstatement of the law and was simply a reiteration of a "valid jury instruction that an abiding belief is one that the jury has after considering all the evidence presented at trial." *Id.* at *5. Similar to this Court's finding in *Pickering*, the prosecutor in Castro-Lino's case simply reiterated the trial court's proper instruction to the jury and did not constitute misconduct.

Castro-Lino also argues the prosecutor's remarks improperly told the jury it had a duty to find him guilty. Castro-Lino states, "...nowhere does the instruction say it is their duty to find the Defendant guilty at all...." Br. of Appellant, p. 26. The prosecutor properly stated the law. It is a jury's duty to return a verdict of guilty if they find, from the evidence,

[2] The amendment to GR 14.1, effective September 1, 2016, allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013 as non-binding authorities, if identified as such by the citing party. This non-binding authority shall be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

that the elements of the crime have been proven beyond a reasonable doubt. To that end, the court instructed the jury that:

> ... If you find from the evidence that elements (1), (2), and (3) have been proved beyond a reasonable doubt it will be your *duty* to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 180; RP 410 (emphasis added). The prosecutor properly reiterated this instruction in his arguments to the jury.

The language of this standard "to convict" instruction has been upheld in all divisions of our Court of Appeals. *See State v. Meggyesy*, 90 Wn.App. 693, 706, 958 P.2d 319 (1998) (Division I); *State v. Brown*, 130 Wn.App. 767, 771, 124 P.3d 663 (2004) (Division II); *State v. Wilson*, 176 Wn.App. 147, 151, 307 P.3d 823 (2013) (Division III), *rev. denied*, 179 Wn.2d 1012, 316 P.3d 495 (2014). In *Meggyesy*, Division I explicitly approved the "duty to convict" language and found it did not misstate the law or invade the province of the jury. *Id.* at 700-01. The Courts in both *Brown, supra* and *Wilson, supra* similarly found the "duty to convict" language was not a misstatement of the law. *Brown*, 130 Wn.App. at 771; *Wilson*, 176 Wn.App. at 150. This was again affirmed in *State v. Moore*, 179 Wn.App. 464, 318 P.3d 296, *rev. denied*, 180 Wn.2d 1019 (2014)

where Division I explained that juries have had the duty to uphold the law since our territorial days, and this includes accepting the law as given to it by the court. *Moore*, 179 Wn.App. at 467 (citing *Hartigan v. Territory*, 1 Wash. Terr. 447, 451 (1874)). The Court in *Moore* emphatically affirmed this precedent stating the "duty to return a verdict of guilty" language is a "correct statement of the law. Jurors have a duty to apply the law given to them." *Id.* at 469.

Additionally, a prosecutor does not commit misconduct by referencing a trial court's instruction to the jury and repeating the language used by the trial court. The trial court instructed the jury using the pattern jury instruction on the elements of second degree rape. WPIC 41.02. This language was a proper statement of the law, as discussed above. Castro-Lino never objected to this instruction and its provision that the jury has a duty to convict if convinced of the defendant's guilt beyond a reasonable doubt; the prosecutor's repetition of the same language used by the trial court is simply not improper. Castro-Lino's remedy would be to challenge the jury instruction as violative of due process, which he does not do, nor could he do successfully as this instruction was proper. Castro-Lino's failure to object to this instruction waives any potential misconduct claim he could present in the prosecutor's reference to the instruction.

It is clear the prosecutor's statement to the jury that if they were convinced beyond a reasonable doubt then "at that point it becomes your duty under the to [*sic*] find the Defendant guilty, which I would ask you to do based on the evidence" was a correct statement of the law. RP 424-25. Castro-Lino's attorney was not ineffective for failing to object to this proper argument, and Castro-Lino could not show any prejudice from his attorney's decision not to object.

All of Castro-Lino's claims of improper argument on the part of the prosecutor are without merit. As an attorney is not required to make frivolous objections or motions, Castro-Lino's attorney was not deficient for failing to object to the prosecutor's proper arguments. Furthermore, Castro-Lino cannot show that any failure to object prejudiced him by either showing the outcome of the trial would have been different had his attorney objected, or that a reviewing court's analysis would have been different under the lesser burden afforded to preserved claims of prosecutorial misconduct. Castro-Lino has not sustained his claims of ineffective assistance of counsel. Castro-Lino's claim fails.

CONCLUSION

Castro-Lino had the benefit of effective assistance of counsel at every stage of his criminal trial. His claims are without merit and the trial court should be affirmed in all respects.

DATED this 6th day of October, 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTOR

October 06, 2016 - 4:20 PM

Transmittal Letter

Document Uploaded: 1-478501-Respondent's Brief.pdf

Case Name: State v. Jose Castro-Lino

Court of Appeals Case Number: 47850-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:

brian@brianwalkerlawfirm.com